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FILED
OCT 2 6 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-254

In the
Supreme Court of the United States

TERMORIO S.A. E.S.P. and LEASECO GROUP, LLC,
Petitioners,
v.

ELECTRIFICADORA DEL ATLANTICO S.A. E.S.P. (in liquidation) and REPUBLIC OF COLOMBIA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In their Brief in Opposition, Respondents accuse Petitioners of "asking the Court to adopt a rule requiring federal courts to look behind foreign judgments based on foreign law to see if the judgment conflicts with the principles underlying the Convention." Br. in Opp. at 11.

But the decision to create that judicial role was not Petitioners'. That decision was made by the signatories to the New York Convention. Those signatories decided that the era of total forum-state control over arbitration awards—which undermined the international arbitration regime and had a stultifying effect on international commerce—had to end. They created an internationally binding set of rules to govern the enforcement of arbitration agreements and awards, and deliberately gave enforcement courts the discretion to disregard forum-state nullification decisions where deference to those decisions would be inconsistent with the Convention's provisions or policies.

To give any real effect to the changes introduced by the Convention's drafters, enforcement courts *must* undertake some substantive review of foreign nullification decisions to determine whether deference is appropriate. If they refuse to do so out of a reluctance to "second-guess" a court of "competent authority," App. 19 (D.C. Circuit opinion), the Convention becomes a toothless document that fails to give international venturers what they require, and what the Convention's signatories sought to give them—assurance that

forum-state courts will not have final authority over their disputes.

That is why the questions presented in the Petition for Review are so critical. And, as discussed below, this case presents an ideal vehicle for this Court's resolution of these questions.

REASONS FOR GRANTING THE WRIT

A. This Case Properly Frames the Questions Presented.

Contrary to Respondents' assertions, the questions set forth in the Petition for Writ of Certiorari are sharply presented by the decisions and record below, with no procedural or other obstacles to their resolution.

1. The Parties' Dispute Is Unequivocally International.

This case is not, as Respondents suggest, a "domestic Colombian dispute," or a "peculiarly Colombian affair." By any rational definition, it is a thoroughly international dispute to which the Convention's provisions and policies apply with full force. Initially, as a matter of plain construction, Petitioners' enforcement action was indisputably governed by the Convention, and Respondents do not argue otherwise. *See* N.Y. Convention, art. I(1) (providing that the classes of awards governed by the Convention include those "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought").

Moreover, to the extent that the international "tone" of a dispute affects the analysis, all of the relevant indicia of "internationality" are abundantly present here. This was a thoroughly international relationship—the Colombian government itself specifically sought out foreign entities to come in and invest in its energy system, and the American company LeaseCo accepted this invitation and invested heavily in a country far from home. The fact that the foreign investors were dealing directly with the host government and its instrumentality amplified the need for the Convention's protections. And while the two nominal parties to the arbitration were Colombian, this was only because the Colombian government itself—the very entity soliciting international investment—required LeaseCo to form Colombian entities as vehicles for the parties' joint venture.

Accordingly, characterizing this case as a "domestic Colombian dispute" borders on the farcical and ignores the real nature of the parties' relationship. *Cf., e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (describing the special concerns associated with international transactions as applying to "any contract *touching two or more countries*") (emphasis added); 9 U.S.C. § 202 (providing that an arbitration agreement or award is deemed to fall under the Convention as long as the underlying commercial relationship has some "reasonable relation with one or more foreign states"). In short, the parties' dispute is precisely the type of "international" one for which the Convention's provisions were designed.

2. This Case Has Nothing to Do with the Colombian Court's Interpretation or Application of Colombian Law.

Respondents' repeated descriptions of this case as one whose resolution turns on Colombian law, and their suggestions that Petitioners are asking this Court to review the Colombian court's interpretation of its own law, are entirely erroneous.

In fact, the questions presented in the Petition for Writ of Certiorari are entirely independent of whether the Colombian court correctly applied Colombian law when it purported to nullify Petitioners' award. The Council of State held that the underlying agreement was void because it specified arbitration procedures different from those set forth in domestic Colombian law—in other words, because the parties exercised an internationally enforceable right provided by the New York Convention. The question presented to this Court is not whether that decision was correct as a matter of Colombian law, but whether such a decision should be deferred to under the treaty whose provisions it directly frustrates.

Nor is the matter resolved by making the "primary/secondary" distinction (i.e., between forum-state courts and courts of other enforcement states) adopted by the D.C. Circuit and urged by Respondents. It may be true that the Convention leaves room for forum-state courts to nullify awards on grounds broader than those available in other enforcement courts. *But see* Emmanuel Gaillard,

The Representations of International Arbitration, N.Y.L.J., Oct. 4, 2007, at 3 (reprinted in the Appendix to this Reply ("Reply App.")), Reply App. 12 (questioning the D.C. Circuit's reliance, in *TermoRio*, on "the concept of courts of 'primary' and 'secondary' jurisdiction, which is absent from the New York Convention"). But even assuming that courts of "primary" jurisdiction have the latitude to entertain certain additional defenses to enforcement, those courts' nullification decisions cannot be deferred to where they *directly conflict with specific provisions set forth in the Convention itself.*

That, of course, is what happened here. The Convention sets forth in precise detail what types of procedural defenses may and may not be recognized under the new regime. The Council of State nullified Petitioners' award based on a procedural defense deliberately abolished by the Convention's drafters. By nonetheless deferring to the Council's decision, the lower courts here enabled Respondents to evade enforcement in a way that the Convention's drafters clearly did not intend.

3. The Other Issues in the Case Do Not Complicate This Court's Consideration of the Questions Presented.

Defendants' suggestion that other issues present in this case counsel against accepting review is meritless. As with most cases that this Court reviews, there are other legal questions that would remain to be resolved if the D.C. Circuit's decision were reversed. But that hardly presents a reason

not to review the questions presented by Petitioners. Those questions are perfectly "teed up" by the D.C. Circuit's judgment and opinion and the record of the proceedings below.

Moreover, Respondents greatly overstate the strength of their alternative defenses. For example, while the *district court* did rely on *forum non conveniens* as an alternative ground for dismissal, it did so in direct contravention of recent Circuit precedent unequivocally precluding application of that doctrine when a foreign state or its instrumentality is sued in a United States court for enforcement of an arbitral award. *See TMR Energy, Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303-04 (D.C. Cir. 2005) (holding that because "only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States" (citing 27 U.S.C. §§ 1609, 1610(a)(6)), there was no adequate alternative forum for the enforcement plaintiff's claims and *forum non conveniens* dismissal would be inappropriate).[1] And even without the *TMR Energy*

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[1] While conceding that the D.C. Circuit did not reach the *forum non conveniens* issue, Respondents cite to an exchange during oral argument in which Judge Edwards suggested that the "abuse of discretion" standard of review would make reversal of the district court on this point difficult. But in *TMR Energy*, the D.C. Circuit held as a matter of law that there is no adequate alternative foreign forum in cases such as the present one. Accordingly, putting aside the fact that statements in oral argument do not amount to final judicial determinations, the D.C. Circuit has made it clear that this is not a matter for a district court's discretion. *See, e.g., El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996) ("Only if there is an adequate alternative forum must the court then weigh the

rule, the district court's *forum non conveniens* conclusion strains credulity—it expressly rests on the conclusion that Colombia is an adequate alternative forum for a case *in which the dispositive issue is whether to defer to a decision of Colombia's highest court. See* App. 30 ("Col[o]mbia is an adequate and a more appropriate forum for resolution of this case.").[2]

In short, contrary to Respondents' assertions, this case is an ideal vehicle for this Court's resolution of the questions presented in the Petition for Writ of Certiorari.

B. The Lower Courts' Decisions Cannot Simply Be Explained Away as Exercises of "Discretion."

Although Respondents attempt to defend the lower courts' decisions as permissible exercises of "discretion," that characterization cannot withstand scrutiny. First, the mere invocation of the word "discretion"—even where it is legally appropriate—does not unmoor a lower court from any legal standards whatsoever. Even legal determinations typically considered "discretionary" are nonetheless

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relative conveniences to the parties against the presumption of the plaintiff's forum selection."); *cf. Koon v. United States*, 518 U.S. 81, 101 ("A district court by definition abuses its discretion when it makes an error of law.").

[2] Respondents are similarly mistaken in their suggestion that the presence of veil-piercing issues in this case affect this Court's certiorari decision. These issues are entirely independent of the questions presented in the Petition for Writ of Certiorari, and in any event only affect one of the two defendants.

guided by standards set forth by statutory or decisional law. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (setting forth factors for courts to consider when faced with a motion to dismiss on *forum non conveniens* grounds); *Koon v. United States*, 518 U.S. 81, 101 (1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."). In the present context, one such standard would presumably instruct enforcement courts *not* to defer to forum-state nullification decisions that are based on defenses expressly eliminated by the Convention's signatories.

In any event, in the decision that Petitioners ask this Court to review, the D.C. Circuit effectively forbade *any* exercise of discretion in favor of *enforcing* awards. That court held that an enforcement court is *required* to defer to a forum-state nullification decision absent evidence that the nullification action was procedurally "tainted." *See* App. 3 ("Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, *obliged to respect it.*") (emphasis added).

That is not an invitation to the exercise of discretion, but a rule of law. Moreover, as discussed in the Petition for Writ of Certiorari, that rule is effectively the law of the United States for a significant class of cases—those involving attempts to enforce arbitration awards against foreign governments or their instrumentalities.

C. A Recent Article Highlights the Significance of the Questions Presented.

A recent law journal article highlights the significance of the questions presented by Petitioners. *See* Gaillard, *supra*, at Reply App. 1-14. Noting that "[o]ne of the most hotly debated subjects is that of the recognition and enforcement of awards set aside in the country where the award was rendered," Reply App. 2, the author accurately describes the D.C. Circuit as having come down on the extreme end of the degree-of-deference spectrum. *See* Reply App. 12 (describing the D.C. Circuit's "interpret[ation of] '[r]ecognition and enforcement of the award *may* be refused' in [Article V(1)(e)] to mean '[r]ecognition and enforcement of the award *shall* be refused' if the award has been set aside in the country in which it was rendered").

The article goes on to describe the severe effect of such a rule on the international arbitration regime:

> This conception of international arbitration . . . results in re-establishing the two levels of control abolished by the New York Convention and requiring a review of the award itself at the seat of the arbitration followed by the recognition, in other countries and on the basis of the rules applicable to foreign judgments, of the judicial decision

> assessing the validity of the award at the seat of the arbitration.
>
> From a legal standpoint, this decision contravenes both the language and the purpose of the New York Convention. From a policy standpoint, it is an encouragement to the losing party to initiate unnecessary litigation in the country where the award was rendered even where no enforcement is sought in that country.
>
> . . . By recognizing an absolute international effect to the positions taken by the courts of the seat of the arbitration which may happen to be the courts of one of the parties to the arbitration, the *TermoRio* decision is a further encouragement to the party resisting arbitration or the resulting award to engage in tactical maneuvers, whereas one of the main purposes of international arbitration is precisely to avoid one party from being subjected to the courts of the other party.

Reply App. 13-14.

CONCLUSION

Petitioners have asked this Court to consider whether United States federal courts should assess forum-state nullification decisions to determine whether deference to those decisions is consistent with the Convention's provisions and policies. Respondents' Brief in Opposition is sprinkled with dour descriptions of the inconvenience and general unseemliness that will ensue if those courts do so. And there is undoubtedly some truth in Respondents' argument. It would admittedly be much simpler, and (in some ways) more sensitive to the relations between sovereign nations, for United States courts to simply do what the D.C. Circuit did and defer absent tangible evidence of procedural "taint" in the nullification proceedings.

But that is not the regime envisioned by the Convention's signatories. Those signatories knew that the provisions they were enacting would require courts to review the decisions reached by their foreign counterparts, and no doubt understood that this would at times have sensitive or inconvenient implications. Ultimately, they considered this an acceptable price to pay for the creation of a robust, reliable international arbitration regime. When an enforcement court nonetheless affords effectively total deference to the forum-state nullification decision, as the D.C. Circuit did here, the result is that the Convention's key advances are undermined and forum-state courts regain their formidable pre-Convention control over arbitration awards.

This case presents a perfect example. Respondents have evaded enforcement of Petitioners' award through a defense that the Convention's signatories deliberately abolished, through the mere expedient of laundering that defense through a forum-state nullification proceeding prior to the commencement of the enforcement action. The D.C. Circuit refused even to consider whether the basis of that nullification supported deference, instead holding that it had to defer to the Colombian court's decision absent evidence that the nullification action was procedurally "tainted." Petitioners respectfully submit that this is not the result intended by the Convention's drafters and signatories, and that the D.C. Circuit's opinion should not be the law of the United States. Accordingly, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED, this 26th day of October, 2007:

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New York Law Journal
Thursday, October 4, 2007

INTERNATIONAL ARBITRATION LAW

The Representations of International Arbitration

Emmanuel Gaillard

One's view of the relationship between international arbitration and national legal systems determines the response to such fundamental questions as the respective role of the arbitral tribunal and the domestic courts (often those of the seat of the arbitration) – for example, in determining the validity of the arbitration agreement, the arbitrators' power to choose the rules applicable to the merits in the absence of agreement by the parties or the enforcement of an award set aside in the country where it was rendered.

The most significant question in this respect is the source of the arbitrators' power to adjudicate. Does such power emanate from a single national legal system (frequently that of the seat of the arbitration) or is international arbitration an autonomous process where the arbitrators derive their powers from the sum of all legal systems that recognize, under certain conditions, the legal force of the arbitration agreement and the resulting award?

The impact of one's representation of international arbitration is not merely a question of legal theory and entails significant practical consequences (on the representations of international

arbitration from both a theoretical and practical viewpoint, see the course given by the author at The Hague Academy of International Law in July 2007 on "ASPECTS PHILOSOPHIQUES DE L'ARBITRAGE INTERNATIONAL," to be published in the Collected Courses of The Hague Academy, as well as the contribution to the Sixth Brazilian Congress on International Arbitration of Oct. 31, 2006 at Salvador de Bahia on "Souveraineté et autonomie. Réflexions sur les représentations de l'arbitrage international," published in JOURNAL DU DROIT INTERNATIONAL, 2007, No. 3. See also "Autonomy of International Arbitration," NYLJ, Dec. 14, 2006; "L'interfèrence des juridictions du siège dans le déroulement de l'arbitrage," LIBER AMIROCUM CLAUDE REYMOND, 2004, at 83; "Enforcement of Awards Set Aside in the Country of Origin: the French Experience," ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 1999, at 505).

One of the most hotly debated subjects is that of the recognition and enforcement of awards set aside in the country where the award was rendered. Those who view international arbitration as rooted in the legal system of the seat of the arbitration will give significant weight to the position taken by the courts of that country on the validity of the award and will expect the courts of other countries where the recognition and enforcement of the award is sought to

defer to such position. Those, on the contrary, who view international arbitration as a process not rooted in a given domestic legal system but deriving its legal force from the entirety of the legal systems that accept to recognize the arbitral award will consider that each legal system should determine for itself (including through its courts) the conditions under which it will recognize and enforce an arbitral award.

The New York Convention

The rules established by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, today binding on 142 countries, provide elements of response to the above questions. Article III of the convention provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure of the territory where the award is relied upon*" (emphasis added). In other words, the standards according to which an award 'shall' be recognized are those of the country where recognition and enforcement is sought.

Consistent with this principle, Article V(1)(e) of the convention envisages the situation where the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made," but does not make it compulsory for the courts of other countries to give effect to such circumstances: in such a situation, "[r]ecognition and enforcement of the award *may*

be refused" (emphasis added). That the convention's drafters specifically chose to use the word "may" rather than "shall" shows their intention to preserve the discretion of every legal system to decide for itself, and, based on its own standards, whether or not an arbitral award meets the conditions of recognition and enforcement (see also J. Paulsson, "May or Must Under the New York Convention: An Exercise in Syntax and Linguistics," ARBITRATION INTERNATIONAL, 1998, at 227). In other words, the positions taken by the courts of the seat of the arbitration with respect to the validity of the award have no absolute effect in other legal systems.

The underlying foundation of these rules is the convention's policy in favor of enforcement of arbitral awards. This pro-enforcement philosophy also justifies the rule under Article VII according to which the convention's provisions do not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." It follows that, in circumstances in which the convention's provisions are more restrictive than the ordinary rules applicable in the country where the award is relied upon, the more favorable rules benefit the party applying for recognition and enforcement.

Focus on the Award

These rules, together with Article IV of the convention, which requires the party applying for recognition and enforcement to supply solely the award and the arbitration agreement, constitute one of the greatest achievements of the New York Convention in that they focus on the award itself rather than on the judicial process surrounding the recognition and enforcement of the award in the country where it was rendered. Having abolished the requirement of "double exequatur" contained in the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the New York Convention no longer requires that an award become "final" in the country where it was rendered in order to be relied upon in another country.

As a result, under the New York Convention, the determination of the validity of an award is conducted on the basis of the award as the primary product of the arbitral process, and not on the basis of the judicial decisions rendered at the seat of the arbitration. The underlying representation is that international arbitration is anchored in all legal systems that accept, according to their respective standards, to recognize the arbitral award, and not in a single legal system assimilating the arbitrators to its judges and integrating their awards into the judicial product of its courts.

This is, for example, the conception long adopted by French case law. French courts have consistently

taken the view that, where an award has been set aside in the country where it was rendered, it can nonetheless be recognized and enforced in France if it meets the requirements of French law (see, in particular, the decisions in Norsolor, Cour de cassation, decision of Oct. 9, 1984, REVUE DE L'ARBITRAGE, 1985, at 431 and, in the English version, INTERNATIONAL LEGAL MATERIALS, 1985, at 360-364; Hilmarton, Cour de cassation, decision of March 23, 1994, REVUE DE L'ARBITRAGE, 1994, at 327 and, in the English version, MEALEY'S INTERNATIONAL ARBITRATION REPORT, vol. 9, Issue 5, May 1994, section E and commentaries at 6-7; and Chromalloy, Paris Court of Appeals, decision of Jan. 14, 1997, REVUE DE L'ARBITRAGE, 1997, at 395 and, in the English version, MEALEY'S INTERNATIONAL ARBITRATION REPORT, vol. 12, Issue 4, April 1997, section B and commentaries at 5-6).

Landmark 'Putrabali' Case

The two decisions rendered on June 29, 2007 by the French Cour de cassation in *PT Putrabali Adyamulia v. Rena Holding* are no exception to this consistent case law. The dispute in that case arose out of the performance of a contract for the sale of white pepper by PT Putrabali Adyamulia (Putrabali) to Rena Holding, with a two-level arbitration in London in accordance with the Rules of Arbitration and Appeal of the International General Produce Association (IGPA). Rena Holding having failed to pay the contract price for cargo lost in a shipwreck during

transport, Putrabali initiated arbitral proceedings in London. A first award ordering Rena Holding to pay the contract price was reversed by a second award of April 10, 2001, holding that Rena Holding was justified in its refusal to pay the contract price (the 2001 award). Following Putrabali's appeal on a point of law, the High Court in London partially annulled the award based on the determination that Rena Holding's failure to pay for the cargo amounted to a breach of contract and remitted the award to the Arbitral Tribunal for reconsideration. On Aug. 21, 2003, the Arbitral Tribunal issued a new award in favor of Putrabali and ordered Rena Holding to pay the contract price of US$163,086 (the 2003 award).

In September 2003, Rena Holding obtained in France the recognition and enforcement of the 2001 award, a decision confirmed on March 31, 2005 by the Paris Court of Appeals (REVUE DE L'ARBITRAGE, 2006, at 665). In turn, Putrabali obtained in France the enforcement of the 2003 award, a decision reversed on Nov. 17, 2005 by the Paris Court of Appeals based on the res judicata effect of the enforcement decision of the 2001 award and the irreconcilable nature of the 2003 award with the 2001 award.

The question before the French Supreme Court was therefore the effect of the partial annulment of the 2001 award and its substitution by the 2003 award or, in other words, the international effect of the English High Court's annulment decision of the 2001 award.

Autonomy of Arbitration

In the first Putrabali decision, the French Cour de cassation maintained the Paris Court of Appeals' reasoning and the former case law on the French courts' discretion to enforce an award set aside by the courts of the seat of the arbitration when the award meets the enforcement requirements of French law set forth in Articles 1502 and 1504 of the New Code of Civil Procedure. The 2001 award meeting the enforcement requirements of French law, there was no justification to refuse its enforcement in France.

The corollary principle, applied in the second Putrabali decision of June 29, 2007, is that the recognition in France of an award set aside in the country where it was rendered is an obstacle to the recognition of a subsequent award rendered following the annulment of the first award, as this would be contrary to the principle of res judicata and the incorporation into the French system of two irreconcilable decisions on the same dispute between the same parties.

These solutions being well-established in French law, the landmark character of the French Supreme Court's decision in Putrabali relates in fact to their ground-breaking justification. The rationale adopted so far by the French courts has been that an arbitral award is "not integrated" into the legal system of the seat of the arbitration and that therefore its annulment by the courts of the seat of the arbitration has no impact on its existence outside the realm of that

particular legal system (see in particular the Hilmarton decision cited above; Paris Court of Appeals' decisions in *Société Bargues Agro Industries v. Young Pecan Company*, June 10, 2004, REVUE DE L'ARBITRAGE, 2004, at 733, and in *La Société SA Lesbats et fils v. Monsieur Volker Le Docteur Grub,* Jan. 18, 2007, unpublished). In Putrabali, the Cour de cassation has reinforced this underlying principle in holding that:

> An international award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought. Under Article VII of the New York Convention of 10 January 1958, Rena Holding was allowed to seek enforcement in France of the award rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules, and could invoke the French rules on international arbitration, which do not provide that the annulment of an award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country.

In other words, the French Supreme Court has recognized not only that an international arbitral award is not integrated into the legal order of the seat of the arbitration, but that it is not anchored in any national legal order at all. This recognition, however, does not mean that the award is not

attached to any legal system. In further deciding that the arbitral award is a "decision of international justice," the Court has determined that it is rooted in a legal order autonomous from the national legal systems. Each state has discretion to determine for itself and based on its own standards whether or not to recognize and enforce an international arbitral award, but such decisions have no impact on the objective existence of the award as an autonomous international decision which derives its legal force from the community of all states and not from a single legal system.

The 'TermoRío' Decision

The decision in Putrabali can be contrasted with the decision rendered on May 25, 2007 by the U.S. Court of Appeals for the District of Columbia Circuit in *TermoRío S.A. E.S.P. and LeaseCo Group LLC v. Electranta S.P. et al.* The Court of Appeals in that case affirmed the District Court's decision to refuse the enforcement of an award annulled in Colombia as the seat of the arbitration (see *TermoRío S.A. E.S.P. et al. v. Electrificadora Del Atlantico S.A. E.S.P. et al.*, March 17, 2006, 421 F. Supp. 2d 87). The dispute related to the purchase by Electrificadora Del Atlántico (Electranta) of energy supplied by TermoRío, a Colombian state-owned public utility, pursuant to a power purchase agreement containing an arbitration agreement with an ICC arbitration in Colombia. The award in excess of US$60 million rendered in 2000 in favor of TermoRío was challenged in Colombia by

Electranta and the Colombian Council of State (Consejo de Estado), Colombia's highest administrative court, set aside the award on the ground that the arbitration clause violated Colombian law which, at the date of the agreement, did not expressly permit recourse to ICC arbitration.

Referring to Article V(1)(e) of the New York Convention, the Court of Appeals held that:

> The arbitration award was made in Colombia and the Consejo de Estado was a competent authority in that country to set aside the award as contrary to the law of Colombia. See New York Convention art. V(1)(e). . . . Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, *obliged* to respect it. . . . Accordingly, we hold that, because the arbitration award was lawfully nullified by the country in which the award was made, appellants have no cause of action in the United States to seek enforcement of the award under the FAA or the New York Convention. (Emphasis added).

Revival of Double Exequatur

The Court's reasoning is largely based on the "validity of a foreign judgment vacating an arbitration award." Deciding that, under the New York Convention, "the critical element is the place of the

award" and that, notwithstanding the convention's "purpose . . . to encourage the recognition and enforcement of commercial arbitration agreements in international contracts," "only a court in a country with primary jurisdiction over an arbitral award may annul that award," the Court held that, under Article V(1)(e), "a secondary Contracting State normally may *not* enforce an arbitration award that has been lawfully set aside by a 'competent authority' in the primary Contracting State" (emphasis added). By adding the word "not" to the language of Article V(1)(e), the Court interprets "[r]ecognition and enforcement of the award may be refused" in that provision to mean "[r]ecognition and enforcement of the award shall be refused" if the award has been set aside in the country in which it was rendered. This is confirmed by the Court's reference to the "command of Article V(1)(e)." No explanation, however, is provided for such reversal of logic, or for the concept of courts of "primary" and "secondary" jurisdiction, which is absent from the New York Convention. Focusing exclusively on "the judgment of a court of competent authority," whose judgment it cannot "second-guess," the Court never even considers the award itself to determine whether it meets the enforcement requirements of U.S. law.

The Court of Appeals thus endorses the representation that views international arbitration as rooted and entirely integrated into the legal system of the seat of the arbitration. Accordingly, if the award is set aside in that system, it simply does not exist to be enforced in other countries:

> . . . an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully "set aside" by a competent authority in the State in which the award was made.

This conception of international arbitration which, in stark contrast with the Putrabali decision, denies any legal existence to the award outside the realm of the seat of the arbitration, results in re-establishing the two levels of control abolished by the New York Convention and requiring a review of the award itself at the seat of the arbitration followed by the recognition, in other countries and on the basis of the rules applicable to foreign judgments, of the judicial decision assessing the validity of the award at the seat of the arbitration.

From a legal standpoint, this decision contravenes both the language and the purpose of the New York Convention. From a policy standpoint, it is an encouragement to the losing party to initiate unnecessary litigation in the country where the award was rendered even where no enforcement is sought in that country.

The recent proliferation of anti-suit injunctions in international arbitration shows that the courts in an increasing number of states support the recalcitrant conduct of the local party to an arbitration – often a state entity – in its attempt to circumvent the arbitration agreement freely entered into or to resist the resulting arbitral award. By recognizing an absolute international effect to the positions taken by

the courts of the seat of the arbitration which may happen to be the courts of one of the parties to the arbitration, the *TermoRío* decision is a further encouragement to the party resisting arbitration or the resulting award to engage in tactical maneuvers, whereas one of the main purposes of international arbitration is precisely to avoid one party from being subjected to the courts of the other party.

By contrast, adopting the view, consistent with the New York Convention, that no sovereign enjoys exclusive rights or can impose on other sovereigns its views with regard to international arbitration – which is today largely recognized as the ordinary means of settlement of international commercial disputes – and that each state has discretion to determine for itself the requirements according to which it will recognize the validity and legitimacy of the arbitral process, is nothing more than recognition that, in this field, indifference is a virtue.

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